**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| Petition of Ameritech For Forbearance from | ) | |
| Dominant Carrier Regulation of its Provision | ) | CC Docket No. 99-65 |
| of High Capacity Services in the Chicago LATA | ) | |
| | ) | |

**COMMENTS OF**
**NEXTLINK COMMUNICATIONS, INC.**

NEXTLINK Communications, Inc. ("NEXTLINK") respectfully submits its Comments in opposition to the above-captioned Petition.[1] NEXTLINK is a national, facilities-based provider of competitive telecommunications services that currently operates twenty-three (23) high-capacity, fiber optic networks providing switched local and long-distance services in thirty-eight (38) markets in sixteen (16) states. As a direct competitor with Ameritech in the Chicago LATA, NEXTLINK has a substantial interest in the outcome of this proceeding.

## I. Introduction

NEXTLINK opposes Ameritech's attempt to obtain premature pricing flexibility outside of the Commission's comprehensive rulemaking on access charge reform.[2] In its petition, Ameritech requests that the Commission forbear from "regulating Ameritech as a dominant carrier in the provision of high-capacity special access, dedicated transport for switched access, and interstate intraLATA private line (point-to-point) services."[3] Specifically Ameritech requests that the Commission forbear from enforcement of the Commission's "Part 61 tariff rules

[1] See Petition of Ameritech for Forbearance from Dominant Carrier Regulation of its Provision of High Capacity Services in the Chicago LATA, filed February 5, 1999 ("Petition").

[2] Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Service Providers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354 (1996) ("Access Charge Reform NPRM").

[3] Petition at 1.

as they apply to dominant carriers and any other rules affecting high capacity services which result in different regulatory treatment for Ameritech vis-a-vis non-dominant carriers."[4] As with the other recent multiple petitions for forbearance presented by Ameritech's fellow Bell Operating Companies ("BOCs"),[5] Ameritech's petition rests on its claim that it does not possess market power in the Chicago LATA. Ameritech's petition is simply insufficient to demonstrate its factual claims and falls substantially short of meeting the requirements of Section 10.

Ameritech's petition for forbearance presents the same arguments supported by the same flawed studies and economic methodologies filed by almost every other BOC in similar forbearance petitions filed during the last year. NEXTLINK urges the Commission to dismiss all of the BOCs' unfounded petitions for pricing flexibility and address this issue in its proper forum, the ongoing Access Charge Reform docket. Even if the Commission considers Ameritech's petition on its own merits, Ameritech simply cannot demonstrate in any reasonable fashion that it does not continue to possess overwhelming market power in the Chicago market. Fundamentally, Ameritech's pleading is silent concerning Ameritech's failure to provide competitors with nondiscriminatory access to Ameritech's local network infrastructure as required by the 1996 Act. As long as Ameritech retains its firm chokehold on local bottleneck facilities, Ameritech will continue to maintain market power in all related markets.

## II. Pricing Flexibility Should Not Be Considered Outside of the Commission's Access Charge Reform Docket

NEXTLINK is firmly opposed to Ameritech and other BOCs' efforts to file separate petitions on pricing flexibility issues that are essentially identical to issues the Commission is

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[4] Id.

[5] See e.g., Petition of the SBC Companies for Forbearance, filed December 7, 1998 ("SBC Omnibus Petition"); Petition of Bell Atlantic For Forbearance, filed January 20, 1999 ("Bell Atlantic Petition"); Petition of the U S West Companies For Forbearance, filed December 7, 1998 ("U S West Seattle Petition"); and Petition of the U S West Companies For Forbearance, filed August 24, 1998 ("U S West Phoenix Petition"). Moreover these petitions and Ameritech's instant petition are remarkably similar in substantive arguments and the scope of evidence presented. In fact, all of the above petitioners submitted studies prepared by the same company, Quality Studies, Inc., that purport to demonstrate that the petitioners are non-dominant in their respective markets.

currently considering in the Access Charge Reform docket.[6] In fact, in the Access Charge Reform docket, the Commission recently requested and received additional comments from parties, including Ameritech, specifically addressing the pricing flexibility issues raised in the instant petition.[7] Even Ameritech recognizes the similarity between its petition and the Pricing Flexibility proposal it put forth in the Access Charge Reform docket.[8]

NEXTLINK urges the Commission to resolve these issues in the Access Charge Reform docket and to dismiss the multitude of BOC "me too" petitions for non-dominant treatment. If the Commission does not firmly direct discussion of these issues to the Access Charge Reform docket, then the BOCs, including Ameritech, will continue to file petitions for pricing flexibility, whether they are styled as petitions for forbearance or something else. Moreover, the multiple petitions for forbearance already filed by BOCs merely reinforce the fact that issues relating to pricing flexibility are national in scope, interrelated and should be considered by industry and regulators in the context of a comprehensive proceeding, such as the Access Charge Reform rulemaking.

## III. Ameritech Has Failed to Provide Sufficient Evidence Demonstrating Actual Effective Competition in its Monopoly Local Telephone Service Markets

Ameritech's petition is simply insufficient to demonstrate the overreaching claims that it makes. Ameritech's petition rests on its claim that it does not possess market power in a market, the "provision of high capacity services" that Ameritech itself has defined in such a manner as to

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[6] Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Service Providers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354 (1996) ("Access Charge Reform NPRM").

[7] Commission Asks Parties to Update and Refresh Record for Access Charge Reform and Seeks Comment on Proposals for Access Charge Reform Pricing Flexibility, Public Notice, FCC 98-256 (rel. Oct. 5, 1998).

[8] Petition at 3, n.7. Although Ameritech states that it is not seeking relief in the "context of the Pricing Flexibility Framework" that it filed in the Access Charge Reform proceeding, it still asserts that it meets that Framework's Phase III requirements for deregulation. Ameritech's statement is further evidence that the proper proceeding to address pricing flexibility is in the Access Charge Reform docket.

minimize and camouflage its continued control of bottleneck local facilities necessary to provide competitive telecommunications services to most end users. Furthermore, Ameritech has measured and portrayed market share in a manner that clearly minimizes the full extent of Ameritech's continued dominance. The Commission cannot rely upon Ameritech's analysis or underlying data.

Through its forbearance petition, Ameritech is attempting to short-circuit the Commission's market-based approach to access charge reform. The success of the Commission's market-based approach rests upon continued vigilance over dominant incumbent providers of access services. If competition has not developed to the point where markets forces can effectively control BOC pricing and other behavior, then the inherent dangers of monopoly control are still present. The Commission must continue to demand the elimination of market entry barriers before granting substantial pricing flexibility.[9]

All of the pricing flexibility proposals presented to the Commission to date, including the instant petition, are an attempt by the BOCs to extinguish competition before it can firmly take root. Before the Commission adopts any framework for pricing flexibility, however, it must require real evidence of substantial competition, including the elimination of critical barriers to entry in the BOCs' monopoly markets.[10] Without effective competition in a market, BOCs will use pricing flexibility to target and attack those markets where the potential for competition at least exists, i.e., where a CLEC is present, and pricing flexibility could be effectively used as a mechanism to destroy the prospects for future competition by undercutting any competitive offering that does emerge. The BOC can engage in such predatory pricing because it has the ability to cross-subsidize anti-competitively priced service offerings with the continued revenue streams it receives from access charges in markets where competition has yet to emerge. The

[9] See Access Charge Reform Order at para. 266.

[10] Such barriers include: (1) BOC control over bottleneck facilities and abuse of that power; (2) state and local regulations inconsistent with competition; and (3) additional barriers created by entities such as building owners and utilities.

Commission must be cognizant that predatory pricing might benefit some consumers in the short term, but it clearly would not be in consumers' best interests in the long run.

### A. Ameritech Continues to Control Local Bottleneck Facilities Essential to the Provision of Local Telecommunications Services

Any analysis of Ameritech's market power must acknowledge Ameritech's continued control over critical local bottleneck facilities. Ameritech's ubiquitous local network gives Ameritech access to every current and potential customer for local services, high-capacity or otherwise. Although NEXTLINK and other CLECs have made substantial strides to deploy facilities in order to bring competition to local markets, it is unrealistic to expect CLECs to duplicate even a fraction of the network Ameritech has spent nearly a century to build. Therefore, the Commission should look skeptically at Ameritech's unfounded suggestion that it is a relatively simple matter for competitive local exchange carriers ("CLECs") to build additional facilities in order to reach a significantly larger portion of Ameritech's customer base.[11] As an initial matter, NEXTLINK takes issue with Ameritech's unsupported assertions regarding the costs necessary for CLECs to expand the scope of their networks.[12] Ameritech fails to provide any underlying data to support its blanket assertions regarding the costs of competitive market entry. In any event, Ameritech appears to have failed to even consider some key market development costs, such as rights-of-way fees and other building access fees, that are integral cost components for any competitor that chooses to enter a new market. These additional entry factors can quickly increase capital expenditures and create further delays for CLECs trying to expand the reach of their current facilities. Furthermore, Ameritech's claims regarding the ease and limited cost of further build-out for CLECs are surprising given Ameritech's claims in other proceedings that it cannot afford to build any facilities in new markets unless it is allowed to enter into one of the largest mergers in the history of the

[11] Petition at 19-21.

[12] Petition, Attachment, "An Analysis of Market Power in the Provision of High-Capacity Access in the Chicago LATA in Support of Ameritech's Petition for Section 10 Forbearance," Dr. Debra Aron (hereinafter "Aron Attachment") at 26-29.

telecommunications industry.[13] The simple fact remains that CLECs cannot simultaneously duplicate Ameritech's network overnight or anytime in the immediate future.

In fact, in the three years since passage of the 1996 Act, Ameritech has not entered on a facilities-basis, any local exchange markets outside of its historical monopoly region. The Commission should not allow Ameritech to rely on statements regarding the supposed ability of CLECs to quickly build out their networks to compete, when Ameritech itself has stated many times in proceedings concerning its proposed merger with SBC that without the combined resources of Ameritech and SBC, it cannot afford to launch any competitive out-of-region services.[14] Frankly, if entering local exchange markets was as simple as Ameritech describes it, clearly Ameritech would have managed to enter a few new local exchange markets by now. Instead, during the past three years, Ameritech has concentrated its efforts to resisting compliance with the market-opening requirements of the 1996 Act.[15]

In addition, Ameritech's argument that CLECs can "address" more Ameritech customers through the use of Ameritech's network elements is unreasonable.[16] NEXTLINK's efforts to provide competitive service in Ameritech's territory has been delayed as a result of Ameritech's decision to severely limit CLECs' access to Ameritech's network elements.[17] For example, Ameritech, contrary to the 1996 Act, requires CLECs to obtain a collocation arrangement in each

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[13] See Merger of SBC Communications, Inc. and Ameritech Corporation, Description of the Transaction, Public Interest Showing and Related Demonstrations (July 24, 1998) at 50-55 ("SBC-Ameritech Merger Petition").

[14] Id.

[15] Ameritech made one application for authority to provide interexchange services under Section 271 in 1997 which was rejected by the Commission. Ameritech has taken no action since that time to demonstrate that it is in compliance with the competitive checklist and that its local markets are open to competition.

[16] Petition at 20-21, Aron Attachment at 26-27.

[17] In addition, Ameritech has delayed NEXTLINK's market entry in Michigan by refusing to agree to NEXTLINK's request to adopt Ameritech's interconnection agreement with MCI Telecommunications. NEXTLINK was only able to obtain an interconnection agreement with Ameritech for Michigan after bringing both an arbitration and a complaint proceeding before the Michigan Public Service Commission. See In the Matter of the complaint of NEXTLINK Michigan, Inc., against Ameritech Michigan, Case No. U-11825 (Feb. 17, 1999).

and every single central office where a CLEC wants to obtain an unbundled loop.[18] Moreover, Ameritech offers collocation arrangements to competitors under onerous terms and conditions and at unreasonable, non-cost based rates.[19] Even if Ameritech began to provide collocation arrangements at reasonable rates, terms and conditions, however, the additional unjustified requirement that CLECs collocate in a central office before reaching a single customer connected to that office unduly burdens CLECs' ability to quickly attract and serve existing Ameritech customers. Furthermore, assuming arguendo that a CLEC had the capital resources to invest in obtaining collocation arrangements simultaneously in every Ameritech central office, there is no question Ameritech could not accommodate that request.[20]

It is ludicrous, however, for Ameritech to suggest that NEXTLINK or any other competitive provider has dislodged Ameritech as the dominant service provider in the market. The ubiquitous scope and scale of Ameritech's network continues to present Ameritech with tremendous advantages that still preclude new entrants from providing market discipline to Ameritech's provision of local services. The Commission has long recognized that incumbents with near monopoly power hold these distinct advantages and it has crafted regulatory safeguards to protect emerging competition in access markets from "foreclosure or deterrence to market entry by new entrants."[21] Ameritech's continued control over the basic facilities necessary to provide service to most customers in its markets alone should preclude the Commission from finding that Ameritech does not have market power.

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[18] Ameritech's requirement that a CLEC only obtain unbundled network elements through collocation arrangements and Ameritech's refusal to provide CLECs with access to extended loops is further evidence of Ameritech's corporate policy to limit and discourage CLEC access to its network.

[19] See also FCC Adopts Rules to Promote the Deployment of Advanced Telecommunications Services, Press Release, CC Docket No. 98-147 (March 18, 1999).

[20] In fact, Ameritech has been unable to comply with its obligations under the Act to provide existing CLEC requests for collocation. Since the total number of Ameritech central offices is significantly greater than the current number of CLEC requests for collocation, it is reasonable to assume that Ameritech would fare even worse if the number of collocation requests increased to such an amount.

[21] See In the Matter of Southwestern Bell Telephone Company, Tariff FCC No. 73, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311, 19327 (1997) ("SWBT Tariff Order").

### B. Ameritech's Petition Does Not Sufficiently Support its Definition of the Relevant Market or Properly Measure Ameritech's Market Share

Ameritech, unsurprisingly, presents a market definition and measure of market share remarkably similar to its fellow BOCs' petitions for forbearance. This tremendous overlap in the market definition in the multiple petitions for forbearance already filed is further evidence that pricing flexibility and the consideration of non-dominant classification for any BOC's provision of services, including high capacity, should be decided in a comprehensive rulemaking proceeding.

First, Ameritech, as in similar petitions filed by its fellow BOCs, relies on the findings of a Quality Strategies study for which Ameritech has not produced any of the study's underlying data. As such the Commission cannot assess the reliability of its results. In any event, the study purports to show that in the most dense urban area, the "Chicago City," that competitors have gained forty-eight (48) percent of the market, but that even in the immediate suburbs, Ameritech's market share leaps to over seventy-two (72) percent.[22] Although Ameritech contends that its petition centers only on the Chicago LATA to limit the scope of its petition, it is clear that by excluding the rest of the relevant Metropolitan Trading Area ("MTA"), Ameritech has made the market share of its competitors seem much greater. Ameritech has not made any showing that the Chicago LATA is a more relevant geographical area than an MTA or any other area for the purposes of defining the relevant market and there is no indication that Ameritech would not hesitate to request relief for different geographic areas if it thought a different boundary could better present "irrefutable evidence of competition."[23]

Moreover, Ameritech has not presented any evidence explaining why measuring market share in terms of "DS-1 equivalents" is more accurate than considering a revenue-based approach, but merely asserts hypothetically that this method is conservative in underestimating

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[22] Aron Attachment at 21.

[23] Petition at 10.

CLEC revenues on the assumption that CLECs target higher revenue customers.[24] NEXTLINK believes that Ameritech has failed to present such evidence because it would most likely demonstrate that Ameritech's "high capacity services" market share as measured by revenues exceeds the market share as measured by facilities that Ameritech claims to possess in its petition.[25] Although those numbers in and of themselves demonstrate that Ameritech remains the dominant provider of "high capacity" services in the Chicago LATA, it is likely that a more accurate assessment of market share would reveal that Ameritech controls an even higher percentage of the market.

Second, Ameritech's petition fails to justify the existence of a single, separate "high capacity" market, including both dedicated special access and switched transport services, as Ameritech attempts to define it.[26] Ameritech fails to acknowledge the significant difference in supply for end user customers and carrier customers. CLECs have begun to build alternative local facilities, but have not yet begun to match the geographic reach of Ameritech's incumbent facilities. Only Ameritech has a ubiquitous network with facilities available to serve end users throughout its market areas. The provision of service to any particular end-user location requires much more extensive facilities than the provision of service to a carrier's point of presence ("POP"). Only Ameritech has the extensive local facilities to provide service to all potential customers. By combining all high capacity services into one "market," Ameritech does not present an accurate depiction of Ameritech's continued control over these essential bottleneck local facilities.

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[24] Aron Attachment at 2, 20, 23.

[25] Ameritech's "DS-1 equivalent" measurement method credits competitors with 24 DS-1s for every DS-3. The revenues obtained from the provision of a single DS-3, however, equal approximately the revenues obtained from 12 DS-1s.

[26] Petition at 9.

## IV. Ameritech Does Not Meet the Standards for Forbearance under Section 10

If the Commission decides to address this petition on its merits, the Commission must deny the petition because Ameritech has failed to meet the statutory requirements for forbearance under Section 10. The evidence in Ameritech's petition alone suggests that a grant of the requested relief to Ameritech would negatively impact overall consumer welfare, thwart emerging competition and completely undermine the Commission's market-based approach to access charge reform.

First, Ameritech is currently regulated as a dominant carrier because it has unquestioned market power throughout its service territory. Ameritech has not demonstrated that it lacks market power regardless of how the "market" is defined because Ameritech has not shown that it has provided nondiscriminatory access to competitors to its bottleneck facilities, and furthermore, it has not shown that its competitors have taken sufficient market share to demonstrate that actual competition exists. A relaxation of dominant carrier regulation over Ameritech would allow Ameritech to subsidize predatory pricing in identified markets by raising prices in other markets where Ameritech is not even attempting to argue that it is not dominant.

Second, Ameritech can already lower prices in response to competitors under the Commission's existing "density zone" rules. To do so, however, Ameritech must lower those prices in both markets where there is some competition and those where there is none at all.[27] The Commission's existing density zone pricing rules not only enable Ameritech to lower prices in response to competitive entry, but they also promote overall consumer welfare by requiring Ameritech to simultaneously lower prices in markets where some competition exists as well as markets where competition has yet to arrive. The long term danger in Ameritech's requested relief is that it would arm the incumbent with the capability to drive out new entrants in small pockets of emerging competition while permitting Ameritech to enjoy the fruits of monopoly pricing in those markets where no competitive alternative exists. Such a result is completely

[27] See 47 C.F.R. § 69.123.

contrary to the requirement of Section 10 that Ameritech show that regulation is not necessary to ensure that the charges, practices, classification, or regulations by, for, or in connection with that service are just, reasonable and not unjustly or unreasonably discriminatory. Ameritech's only defense to this concern is its contention that it has little ability to maintain prices well above those of its competitors and that consumers will not be harmed if its petition is granted. Ameritech has completely failed to address its ability to cross-subsidize its high capacity services in the Chicago LATA with revenue obtained from areas in which it indisputably retains dominant market power.

Furthermore, a grant of Ameritech's petition would harm both the short and long-term interests of consumers. Although some customers in some markets may benefit from Ameritech's ability to charge lower prices, overall consumer welfare will be decreased because Ameritech will no longer have to make those rates available to all consumers in similar density zones. In the long-term, Ameritech's ability to predatorily price and to cross-subsidize its services in the markets at issue in the petition will destroy CLECs' ability to compete and damage the long term prospects for sustainable, irreversible competition in these markets. That will only result in Ameritech's unfettered ability in all markets to charge supracompetitive rates.

Finally, the Commission has clearly articulated that pricing flexibility is an interrelated part of its efforts to reform the access charge rules. In addition to the above discussed harm to consumers and competitors that is clearly not in the public interest, a grant of this petition would immediately short-circuit the Commission's current market-based approach to access charge reform and any further efforts to reform its access charge rules in the Access Charge Reform docket.

## V. Conclusion

The Commission should dismiss Ameritech's petition for forbearance because it is an inappropriate attempt to circumvent the Commission's comprehensive rulemaking on reform of its interstate access charge rules. If the Commission chooses to consider Ameritech's petition on

its merits, however, the Commission should deny Ameritech's petition because it is based on flawed and misleading evidence and fails to demonstrate that Ameritech lacks market power in the Chicago LATA. Furthermore, Ameritech's petition does not even address Ameritech's continuing lack of compliance with the market-opening requirements of the 1996 Act and Ameritech's resulting chokehold on local bottleneck facilities. Ameritech's petition does not meet the statutory requirements for forbearance and a grant of the requested relief would be contrary to the public interest. NEXTLINK therefore urges the Commission to reject Ameritech's petition.

Respectfully submitted,

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March 31, 1999

## CERTIFICATE OF SERVICE

I, Tracey A. Bogans, a Legal Assistant in the law firm of Davis Wright Tremaine LLP, do hereby certify that a copy of the aforesaid "Comments of NEXTLINK" was served on the persons specified below, by U.S. Mail, First Class Postage Prepaid, on March 31, 1999:

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